

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

DAO VAN VY,

Defendant and Appellant.

H025873

(Santa Clara County
Super.Ct.No. CC092402)

**ORDER MODIFYING OPINION
AND DENYING REHEARING**

NO CHANGE IN THE JUDGMENT

It is hereby ordered that the opinion filed herein on October 1, 2004, be modified as follows:

1) On page 6 at the end of the first paragraph, immediately after “friends,” add the following:

The YA members did not spend all of their time getting into fights. They also “hung out” and did “stuff that 16-year-olds do.”

2) On page 9 after the second full paragraph ending with “culture,” add the following new paragraph:

[¶] Detective Ta was familiar with the Vietnamese gang, YA. It was started in 1998, and as of May 2000, it had approximately six members. YA’s rival gangs included Nguio Viet and VK. KON—although not a direct enemy of YA—was a YA rival because of KON’s alliance with VK. Detective Ta understood that the YA gang of which defendant

* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of parts III through VIII, inclusive.

was a member was the third generation of YA; the two prior generations of YA were “much more violent” than the third generation.

3) On page 13, delete footnote 9. The remaining footnotes should be renumbered accordingly.

4) On page 18, at the end of the second full paragraph after “crime,” add the following (including insertion of new footnote, number accordingly):

Moreover, the fact that there was evidence elicited from Tai during cross-examination by defense counsel that the YA members did “stuff that 16-year-olds do” does not negate other evidence that YA committed crimes sufficient to satisfy the “primary activities” prong of section 186.22(f).^{FN}

^{FN} The exchange of questions and answers between defense counsel and Tai was as follows: “Q. Did you guys just sometimes just go hang out? [¶] A. Yeah. . . . [¶] Q. Did you spend all of your time going out and getting in fights when you were together? [¶] A. What do you mean? [¶] Q. During the time that you were with Dao and Tu and Andy, did you spend all of your time these two or three years that you knew them always getting in fights? [¶] A. No. [¶] Q. Did you just kind of do stuff that 16-year-olds do? [¶] Yeah. [¶] Most of the time were you basically just doing the stuff that 16-year-olds do? [¶] A. Yes.”

5) On page 27, at the end of the second paragraph after “weapon” (and after footnote 20), add the following:

He argues further that the court’s failure to give the related-offense instruction violated his federal constitutional right to due process.

6) On page 29 at the end of the partial paragraph after “(*Id.* at p. 134.), add the following new paragraph:

[¶] We likewise reject defendant’s federal constitutional challenge to the court’s refusal of the related-offense instruction. In *Hopkins v. Reeves* (1998) 524 U.S. 88 (*Reeves*), the United States Supreme Court held that a state does not violate constitutional principles of due process when it denies instructions requested by a capital defendant on a lesser nonincluded offense. As our Supreme Court in *Birks* court noted: “*Reeves* stressed . . .

that most states provide for instructions ‘only’ on lesser necessarily included offenses in both capital and noncapital cases, and ‘[w]e have never suggested that the Constitution requires anything more.’ [Citation.]” (*Birks, supra*, 19 Cal.4th at p 124, quoting *Reeves, supra*, 524 U.S. at pp. 96-97.)

The petition for rehearing by appellant is denied. The application filed by respondent to correct its brief and to modify the opinion is granted.

There is no change in the judgment.

Dated:

Walsh, J.*

Rushing, P.J.

Premo, J.

* Judge of the Santa Clara County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.